**Editor's note: Reconsideration denied by Order dated Sept. 13, 1984**

CITIZENS FOR THE PRESERVATION OF KNOX COUNTY

IBLA 83-631
IBSMA 83-2 Decided June 5, 1984

Appeal from the decision of the Director, Office of Surface Mining, denying appellant's request for a Federal inspection and Federal enforcement action.

Affirmed.

1. Rules of Practice: Appeals: Standing to Appeal

   Where appellant's statement of reasons for appeal asserts that many of its members live in close proximity to a mine and are adversely affected in their property, aesthetic, and recreational interests as a result of the mine owner's failure to comply with the permitting requirements of the approved Illinois program, appellant has standing to appeal the decision of the Director, OSM, finding that there is no violation by the mine owner.

2. Surface Mining Control and Reclamation Act of 1977: Appeals: Generally -- Surface Mining Control and Reclamation Act of 1977: Permit Application: Generally
   OSM properly refused to conduct a Federal inspection or undertake enforcement action where a mine owner continued to conduct only reclamation operations under an interim permit after 8 months following approval of a state's permanent program. SMCRA and the applicable regulations do not require an operator who has ceased all mining operations prior to the approval of a state's permanent program to obtain a permanent program permit.

3. Surface Mining Control and Reclamation Act of 1977: Permit Application: Generally

   Where, under circumstances of this case, it is determined that reclamation operations proceeding under an interim permit do not require a permanent program permit, such operations need not comply with the public

participation and substantive reclamation requirements of the permanent program.

4. Constitutional Law: Due Process

Due process requirements are met so long as notice is given and an opportunity to be heard is granted before deprivation of property becomes final.

APPEARANCES: Mark Squillace, Esq., Susan A. Shands, Esq., Washington, D.C., for appellant; Milo Mason, Esq., Walton D. Morris, Jr., Esq., Office of the Solicitor, for the Office of Surface Mining; Robert A. Creamer, Esq., Chicago, Illinois, for intervenor Midland Coal Company.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Appellant appeals the decision of the Director, Office of Surface Mining (OSM), dated December 16, 1982, denying appellant's request for a Federal inspection and Federal enforcement action at the Midland Coal Company's( Midland) Mecco Mine in Knox County, Illinois.

Midland began a surface coal mining operation at the Mecco Mine in 1956. After the enactment of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1201 (1982), Midland obtained various interim permits from the Illinois Department of Mines and Minerals, including permit Nos. 567-79, 823-82, 824-82, 835-82, Gob 30, Gob 69, and Slurry 87. 1/ By letter dated May 21, 1982, Phil L. Christy, Reclamation Director for Midland, notified Douglas Downing of the Illinois Department of Mines and Minerals, Land Reclamation Division, that Midland had declared a permanent cessation of operations at the Mecco Mine. 2/ Christy advised Downing that reclamation activities consisting of topsoil replacement in parcel 2 of permit

1/ Midland filed applications and proposed reclamation plans with the Illinois Department for parcel 2 and the haul road area in February 1979. In May 1979, Midland's applications were deemed "complete" under Illinois procedure and were then filed with the Knox County Clerk for public review. In September 1979, public hearings were conducted by the Illinois Department in Knox County on Midland's two applications. During 2 days of hearings, comments of the public, including appellant, were heard on Midland's proposed reclamation plans.

In December 1979, the Illinois Department approved Midland's reclamation plans and issued permits No. 823-82 (mining) and No. 824-82 (access and haul road) (Answer of Midland to Appellant's Statement of Reasons at 2).

2/ Mecco Mine was closed temporarily in May 1980 when the bankruptcy of the Rock Island Railroad resulted in the cessation of rail service to the mine. Mecco Mine was closed permanently in May 1982 after all attempts to restore rail service were unsuccessful (Answer of Midland to Appellant's Statement of Reasons at 1).

No. 823-82 3/ and haulage road reclamation work on permit No. 824-82 4/ were planned for 1982. He further advised that Midland was planning an additional 2 years to complete the reclamation on the haulage roads, support facility, and refuse areas; and requested an extension of time to December 1, 1984, "to complete the reclamation grading on all above areas" (Christy letter of May 21, 1982).

On June 1, 1982, the Secretary of the Interior approved the Illinois permanent program. 30 CFR 913.10. That program provides, in part, that:

> Not later than two months following the approval of the Illinois permanent program * * *, all operators of surface coal mines in expectation of operating such mines after the expiration of eight months from the approval of the Illinois permanent program * * * shall file an application for a permit with the Department. Such application shall cover those lands to be mined after the expiration of eight months from the approval of the Illinois program * * *. [Emphasis added.]

I. R. 1700.11(f).

By letter dated June 26, 1982, appellant wrote to Midland commenting on Midland's May 21, 1982, letter to the State and stated:

> As you know such reclamation is considered surface coal mining and reclamation operations under the Federal Act and State Permanent Program. You'll be doing reclamation work well past February of 1983 which is eight months after the State got primacy. As we understand the Program, Midland needs to submit a permanent program application to the Illinois Department of Mines and Minerals by August 1, 1982.

On August 25, 1982, Mary Jo Murray, Chief Legal Counsel, Land Reclamation Division, Illinois Department of Mines and Minerals, responded to appellant's inquiry asking whether Midland would be required to submit a permanent program permit application in order to continue to conduct reclamation activities at its Mecco Mine. Murray concluded that a permanent program permit

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3/ Midland's Answer at page 1 stated that "Parcel 2 of Permit 823-82 was never mined. The only 'mining operations' ever conducted on Parcel 2 were the initial removal and stockpiling of approximately 172 acres of topsoil and a few acres of root medium, which took place between December 1979 and May 1980."

4/ Midland's Answer at page 2 stated, "Permit 824-82 covered the haul road that was intended to serve the area covered by Permit 823-82. Reclamation of the haul road permit area, which involves approximately 34 acres of road area and 3 acres associated with power lines, is expected to extend into 1984."

was not necessary for reclamation activities alone. The conclusion was based on a reading of the applicable Illinois Rules and Regulations. 5/

Midland, never having applied to Illinois for a permanent program permit for its reclamation operation on parcel 2 (permit No. 823-82) and the haul road area (permit No. 824-82), continued to proceed according to reclamation plans approved under the interim program.

On August 27, 1982, appellant filed a citizen complaint with OSM requesting a Federal inspection and Federal enforcement action against Midland for conducting surface coal mining and reclamation operations at the Mecco Mine without applying for a permanent program permit within 2 months from the date of approval of the Illinois permanent program by the Secretary of the Interior. By letter dated September 3, 1982, Daniel A. Jones, Director, OSM Illinois Field Office, determined that a permanent program permit is not required where an operator proposes to conduct only reclamation operations. 6/

On October 13, 1982, appellant requested informal review of the Jones' decision in accordance with 30 CFR 842.15, arguing that the OSM decision set an unlawful precedent for the consideration of permits for operators who have completed mining but are continuing reclamation activities under recently approved state programs. 7/ A follow-up letter was sent by appellant on November 3, 1982.

By letter dated December 16, 1982, the Director, OSM, affirmed the Jones' decision. OSM reiterated its position that a permanent program permit is not necessary for the Mecco Mine because, in the Director's words:

> We believe that the permit requirements of Section 508 apply to the conduct of surface coal mining operations which

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5/ Murray stated,

"Section 2.01 of the Act requires a permit for mining operations. Section 1771.21 of the Illinois Rules and Regulations states that a permit will be necessary for persons who expect to conduct 'surface coal mining and reclamation activities.' The words 'reclamation activities' cannot be read alone; they must be read in conjunction with 'surface coal mining and.'" (Emphasis in original.)

6/ Jones advised appellant that OSM's position was based, in part, on section 506(a) of SMCRA which provides, inter alia, that "no person shall engage in or carry out on lands within a State any surface coal mining operations unless such person has first obtained a permit issued by such State pursuant to an approved State program."

7/ Appellant asserted that under section 502(d) of SMCRA, 30 CFR 771.21(a)(1) and sections 1700.11(f) and 1771.21(a)(1) of the Illinois permanent program regulations, a permanent program application is clearly required in the subject case. Further, appellant asserted that the detailed reclamation provisions of section 508 of SMCRA and 30 CFR Part 780 are to be applied during a state's permanent program to all surface coal mining and reclamation operations.

> include the extraction of or the intent to extract coal. . . . [T]he conduct of reclamation activities where no further mining of coal is to occur does not necessitate obtaining a permanent program permit. Midland does not intend to mine any more coal on this site. Consequently, Midland Coal is not required under SMCRA to obtain a permanent program permit to complete reclamation at the Mecco Mine.

On January 10, 1983, appellant filed a notice of appeal challenging the Director's decision denying appellant's request for Federal inspection and enforcement action against Midland for violating the permitting requirements of the approved Illinois program. Appellant asserts in the statement of reasons that (1) the Illinois program requires permits for reclamation operations, because the Illinois regulation at 1771.21(a)(1) is directed at persons who conduct or expect to conduct "surface coal mining and reclamation operations"; and (2) the public participation and substantive reclamation requirements of the approved Illinois permanent program will be met only by requiring reclamation operations to operate under the permanent program.

OSM in its answer argues that the Secretary's regulations do not require a permanent program permit for reclamation activities where coal extraction was completed during the interim program period. Further, OSM asserts that requiring Midland to obtain a permanent program permit when conducting only reclamation activities might encourage abandonment of interim program operations because of the unrecoverable expenditures created by the permanent program permitting process which could result in financial ruin for the operator.

Intervenor Midland in its answer to appellant's statement of reasons asserts that appellant lacks standing, that granting appellant's appeal would deny Midland due process, and that appellant's position is not supported by SMCRA or policy considerations.

[1] Midland's challenge to appellant's standing rests on its assertion that appellant has failed to demonstrate that it has any interest which is or may be adversely affected by OSM's decision. The applicable regulation at 30 CFR 842.14(a) provides that:

> Any person who is or may be adversely affected by a * * * surface coal mining and reclamation operation may ask the Director * * * to review informally an authorized representative's decision not to inspect or take appropriate enforcement action with respect to any violation alleged by that person in a request for Federal inspection under § 842.12.

The regulation at 30 CFR 842.15(d) then provides that the written decision by the Director is appealable to this Board. Midland contends, relying on Pacific Legal Foundation v. Gorsuch, 690 F.2d 725 (9th Cir. 1982), that no injury in fact to appellant has been shown and that appellant must have more than a mere interest in a problem to render it adversely affected.

We disagree. Appellant's situation is unlike that of the Pacific Legal Foundation, supra. Appellant stated that it has approximately 300 members, many of whom live in close proximity to the Mecco Mine and are adversely affected in their property, aesthetic, and recreational interests as a result of Midland's failure to comply with the permitting requirements of this approved Illinois program. Appellant clearly has standing to bring this action. Cady v. Morton, 527 F.2d 786, 791 (9th Cir. 1975); Sierra Club v. Morton, 514 F.2d 856, 869-70 n.20 (D.C. Cir. 1975), rev'd sub nom. on other grounds, Kleppe v. Sierra Club, 427 U.S. 390 (1976). See also Montgomery Environmental Coalition v. Costle, 646 F.2d 568, 576-78 (D.C. Cir. 1980); Virginians for Dulles v. Volpe, 541 F.2d 442, 444 (4th Cir. 1976).

[2] We now turn our attention to the basic issue before this Board: whether Midland, having completed all mining operations under an interim program permit and prior to approval of a permanent permit program in Illinois, is required to obtain a permanent program permit for its remaining reclamation operations.

Although appellant challenges the interpretation given to the Illinois regulations, 8/ our concern focuses on the applicable sections of SMCRA and the Federal regulations to see whether the interpretation given to the Illinois regulations is consistent with the Federal requirements.

Section 502 of SMCRA authorizes and establishes the interim program for regulating surface coal mining operations. 9/ Section 502(d) states that

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8/ The Illinois regulation at section 1770.11(f) provides in pertinent part:

"Not later than two months following the approval of the Illinois permanent program pursuant to section 503 of the Federal Act * * * all operators of surface coal mines in expectation of operating such mines after the expiration of eight months from the approval of the Illinois permanent program * * * shall file an application for a permit with the Department. Such application shall cover the approval of the Illinois program."

"Not later than two months following the initial approval by the Secretary of a regulatory program for Illinois, * * * each person who conducts or expects to conduct surface coal mining and reclamation operations after the expiration of eight months from that approval shall file an application for a permit for those operations."

9/ SMCRA, section 701(28), states in part:

"(28) 'surface coal mining operations' means --

"(A) activities conducted on the surface of lands in connection with a surface coal mine * * * the products of which enter commerce or the operations of which directly or indirectly affect interstate commerce. Such activities include excavation for the purpose of obtaining coal * * *, the uses of explosives and blasting, and in situ distillation or retorting, leaching or other chemical or physical processing, and the cleaning, concentrating, or other processing or preparation, loading of coal for interstate commerce at or near the mine site: * * * and

"(B) the areas upon which such activities occur or where such activities disturb the natural land surface. Such areas shall also include any adjacent

> Not later than two months following the approval of a State program pursuant to section 503 * * * all operators of surface coal mines in expectation of operating such mines after the expiration of eight months from the approval of a State program * * * shall file an application for a permit with the regulatory authority. Such application shall cover those lands to be mined after the expiration of eight months from the approval of a State program * * *.

30 U.S.C. § 1252(d) (1982).

The language of the statute specifies that "operators" of surface coal mines who expect to be mining after the expiration of 8 months from the approval of a state program must file for a permanent program permit to cover those lands to be mined. An operator is defined by SMCRA at section 701(13) to be "any person, partnership, or corporation engaged in coal mining who removes or intends to remove more than two hundred and fifty tons of coal from the earth by coal mining within twelve consecutive calendar months in any one location."

Section 506(a) of SMCRA, addressing the requirements of obtaining a permit under the permanent permit program, states that "no person shall engage in * * * any surface coal mining operations unless such person has first obtained a permit issued * * * pursuant to an approved State program." An exception is provided, however, for "a person conducting surface coal mining operations under a permit from the State regulatory authority, issued in accordance with the provisions of section 502." (Emphasis added.) Such a person "may conduct such operations" beyond the 8-month period if an application for a permanent permit has been filed but a decision has not yet been rendered. H.R. Rep. No. 95-218 at page 86 (April 22, 1977) discusses section 506(a) by stating that "Operators are required to obtain permits 8 months after approval of a State program. * * * Mines operating under existing permits may continue to mine without a new permit, however, if an administrative decision has not been rendered during that period." (Emphasis added.)

The thrust of the statutory language is directed at mining. SMCRA and its legislative history reveal that Congress contemplated the regulation of mining operations and that it is the undertaking of such mining operations that triggers the necessity for a permit under SMCRA.

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fn. 9 (continued)
land the use of which is incidental to any such activities, all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of such activities and for haulage, and excavations, workings, impoundments, dams, ventilation shafts, entryways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, processing areas, shipping areas and other areas upon which are sited structures, facilities, or other property or materials on the surface, resulting from or incident to such activities; * * *."

Midland declared, and appellant does not challenge, that there was a permanent cessation of mining operations at the Mecco Mine prior to approval of the Illinois permanent permit program on June 1, 1982. Thus, at the time the permanent program was approved, Midland was not an operator of a surface coal mine at Mecco with any expectation of operating such mine. There was no land being mined or expected to be mined, and the land which was the subject of the continuing reclamation work had never been mined.

Appellant argues, however, that the regulations provide that permits are required for reclamation operations. The pertinent regulations for our review are the Federal regulations to be found at 30 CFR 771.11 10/ and 30 CFR 771.21(a)(1), 11/ both of which cite section 502(d) and section 506(a) as their statutory authority. 12/ Appellant contends that since the language used in the applicable regulations is "surface mining and reclamation operations" (rather than "surface coal mining operations" as used in the statute) that the regulations expressly make the permitting standards applicable to reclamation operations. The preamble to the proposed regulations stated, however, that

> Section 771.11 is proposed to implement particularly Sections 102(b), (c), (d), (e) and 506(a) of the Act, so that mining is not conducted under regulatory programs, until after the regulatory authority has determined that the operations will be conducted in compliance with the applicable environmental protection performance standards of Subchapter K. [Emphasis added.]

43 FR 41687 (Sept. 18, 1978). The preamble to the proposed regulation at 30 CFR 771.19(a), which was renumbered in the final regulation as section 771.21(a)(1), stated:

> Subsection (a) would implement the deadlines found in Sections 502(d) and 506(a) of the Act. Under Subsection (a), if an operator expects to be mining eight months or more from the time

10/ "§ 771.11 General requirements for permits -- Operators.

"Except as provided for in § 771.13(b), on and after 8 months from the date on which a regulatory program is approved by the Secretary, no person shall engage in or carry out surface coal mining and reclamation operations on non-Federal or non-Indian lands within a State, unless that person has first obtained a valid permit issued by the regulatory authority under an approved regulatory program."

11/ "§ 771.21 Permit application filing deadlines.

"(a) Initial implementation of permanent regulatory programs.

(1) Not later than 2 months following the initial approval by the Secretary of a regulatory program under Subchapter C of this chapter, regardless of litigation contesting that approval, each person who conducts or expects to conduct surface coal mining and reclamation operations after the expiration of 8 months from that approval shall file an application for a permit for those operations."

12/ See 43 FR 41687 (Sept. 18, 1978) and 43 FR 41688 (Sept. 18, 1978).

> of the approval of a regulatory program, he would have to submit an application for a permit under that program no more than two months after the approval of that program by the Secretary. [Emphasis added.]

43 FR 41688 (Sept. 18, 1978). The statement of purpose for both regulations explained that mining is to be conducted under the regulatory program and that only an "operator" who expects to be mining eight months after state primacy need apply for a permanent permit. These explicit explanations concerning mining are reiterated by reference in the preamble to the final regulation. 44 FR 15014-15015 (Mar. 13, 1979). Consequently, it seems reasonable to conclude that the regulations express an anticipation that where there is mining, there is also to be reclamation.

We find that the foregoing material lends itself to the interpretation advocated by OSM before this Board. 13/ Although the regulations refer to surface coal mining and reclamation operations, OSM argues that the use of the conjunctive "and" rather than the disjunctive "or" indicates that the regulations apply only when surface coal mining and the responsibility for reclamation occur together under the permanent program. Use of the disjunctive "or" would have made it clear that reclamation activities, apart from mining activities, would require a permit. OSM states:

> Both coal mining and the responsibility for reclamation must exist within a discrete jurisdictional time period for the requirements of that jurisdictional time period to be imposed. Because of the jurisdictional "break" between the interim program and the permanent program, OSM believes that those operations which had extracted coal only during the interim program and which now engage only in reclamation activities are not subject to the permitting requirements of the permanent program. In other words, when surface coal mining occurs, it triggers the requirement of reclamation; and both activities are subject to the permitting requirements only during the jurisdictional period in which both activities occur. The regulations require permanent program permits only when surface coal mining and the responsibility for reclamation occur together during the permanent program. 6/ When coal extraction occurs only in the interim program period and only reclamation activities occur after state program approval, the language of the regulations does not require a permanent program permit for the reclamation activities.

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6/ Of course, reclamation activities which follow coal extraction which occurs during the permanent program must be permitted until they are completed and the bond release occurs.

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13/ I.R. 1770.11(f) follows the language of section 502(d) of SMCRA, while I.R. 1771.21(a)(1) follows the language of 30 CFR 771.21(a) which is authorized by the more general language of 506(a) of SMCRA.

> Of course, following this logic, what was a surface mining and reclamation operation for purposes of the interim program on May 31, 1982, was not a surface coal mining and reclamation operation for purposes of the permanent program on June 1, 1982, the date of Illinois' assumed primacy. It is OSM's position that this is both logical and practical. The interim program and the permanent program are separate regulatory regimes. If the two activities (coal mining and its concomitant reclamation requirement) that triggered the permit obligation in one regime are not present in the other, the permit obligation is not triggered.

Reply in Opposition to Appellant's Statement of Reasons at 7-8. We believe that the language and legislative history of SMCRA and the Federal and Illinois regulations, support OSM's position.

OSM further argues, as a matter of policy, that it is impractical to require mine owners to get a permanent permit when they have only reclamation activities left to complete under an interim permit 8 months after a permanent program has been approved. Although SMCRA clearly requires mining operations to be permitted, it also requires reclamation to be conducted once mining is undertaken. See sections 502 and 506 of SMCRA. Reclamation regulation is an important part of SMCRA. However, OSM argues that "[a]n operator who already sold or contracted its coal at a price calculated without the extensive capital costs of obtaining a permanent program permit for * * * reclamation activities after the interim program could face financial ruin" (OSM Answer at 8). OSM hypothesizes that the $25,000 to $75,000 estimated cost of a permanent permit could divert capital expenditures from reclamation activities. That result, of course, runs counter to the Congressional intent to see to it that lands which are mined are reclaimed. Along these lines, OSM also suggests that out of economic self-interest, operators may abandon reclamation and forfeit bond rather than pay the expense of a permanent permit. Although these reasons alone, without support from SMCRA and the regulations, would not be sufficient to persuade us, they offer practical support to a conclusion derived from evaluating the material before us.

Thus, we conclude that where, as in Midland's situation, there was a permanent cessation of operations at the Mecco Mine prior to the approval of the State permanent program permit, the remaining reclamation operations may be completed under the interim regulations.

Consequently, appellant's request for a Federal inspection and enforcement action was properly denied by OSM because there was no violation under the Department's interpretation of SMCRA and the regulations. The State of Illinois interpretation of the regulations is consistent with the Federal interpretation.

[3] Appellant also urged that Midland should be required to submit an application for a permanent permit for its Mecco Mine reclamation operations in order to assure that the public participation and substantive reclamation requirements of the approved Illinois program will be met. The question is, under the circumstances of this case, whether Midland's reclamation operations are intended and required by SMCRA to be covered by the permanent program. We

have decided that they are not. Consequently, if such reclamation operations do not require a permanent permit, then they need not be in compliance with the public participation and substantive reclamation requirements of the permanent program. Since Midland need not comply with the permanent program, its reclamation operations will continue to be subject to the interim permit requirements, with OSM and Illinois invested with the authority to continue enforcement of the interim permit until the work has been completed. Midland pointed out in its Answer that appellant "participated in two full days of hearings conducted by the Illinois Department with respect to the interim program reclamation plans for Permits 823-82 and 824-82" (Midland's Answer at 6).

[4] In conclusion, we will briefly address Midland's argument that granting appellant's appeal would deny Midland due process. Midland, as an intervenor, had an opportunity to raise any relevant arguments to persuade this Board to reject appellant's position. Midland asserted, however, that if this Board were to find that the statute and regulations required Midland to obtain a permanent permit, the resulting retroactive revocation of Midland's existing interim program permit would result in a taking of Midland's property without due process. We do not so find and, contrary to Midland's argument, there is no "taking" of Midland's property. However, if we had found that Midland is required to obtain a permanent permit, Midland would have been given another opportunity to protect its rights. Under regulations 30 CFR 843.15 and 843.16 Midland may request a hearing if it is issued a notice of violation or cessation order. As this Board has frequently stated, due process requirements are met so long as notice is given and an opportunity to be heard is granted before deprivation of property becomes final. Philip A. Cramer, 74 IBLA 1 (1983); Anita Robinson, 71 IBLA 380 (1983).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, as amended, 49 FR 7564 (Mar. 1, 1984), the decision of the Director, OSM, is affirmed.

Edward W. Stuebing
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Gail M. Frazier
Administrative Judge